

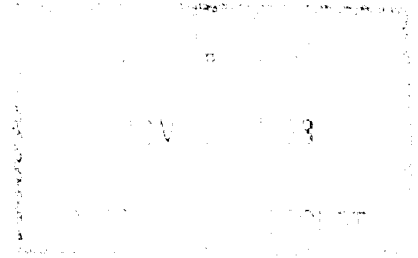
IN THE COURT OF APPEALS OF IOWA

No. 8-464 / 97-1197
Filed November 30, 1998

MARK J. MEIS d/b/a MEIS CONSTRUCTION,
Appellee,

vs.

CORNELIUS REAL ESTATE, INC.,
Appellant.



Appeal from the Iowa District Court for Woodbury County, James D. Scott,
Judge.

Cornelius Real Estate, Inc. appeals from a district court decree foreclosing
Mark J. Meis's mechanic's lien. **AFFIRMED.**

George T. Qualley of Qualley & Associates, Sioux City, for appellant.

Paul D. Lundberg of Cosgrove, Hellige, Lundberg, Meis & Hindman, Sioux
City, for appellee.

Considered by Sackett, P.J., and Huitink, Streit, Vogel, and Mahan, JJ.

STREIT, J.

Cornelius Real Estate, Inc. appeals from the trial court's foreclosure of Mark Meis's mechanic's lien on its property in the amount of \$8328.67. Because Meis has proven an express contract between the parties that Cornelius would pay Meis twenty dollars an hour for labor, plus cost of materials, and Cornelius has not proven his defenses, we affirm the trial court's ruling foreclosing on the mechanic's lien.

I. Background & Facts.

Mark Meis and Cornelius Real Estate, Inc. had an oral contract that Meis would remodel a portion of the Sioux City Health Club in exchange for \$20 per hour labor, plus materials. Meis was to furnish weekly statements for labor and materials and Cornelius would pay them.

Meis began work on the health club on April 17, 1995. Cornelius paid the contract weekly. In mid-May of 1995, Cornelius stopped paying. Meis left the project on June 9, 1995.

Mark J. Meis d/b/a Meis Construction filed a petition in equity to foreclose a \$8328.67 mechanic's lien against Cornelius Real Estate, Inc. for work performed. Cornelius claimed Meis had overcharged him for labor and materials and breached the oral contract.

The matter was tried to the court. After trial, the court foreclosed the lien in the amount of \$8227, plus ten percent interest, and awarded Meis \$3000 in attorney fees. Cornelius appeals.

II. Standard of Review.

An action to enforce a mechanic's lien is in equity. Iowa Code § 572.26 (1997). Our review is de novo. *A & W Elec. Contractors, Inc. v. Petry*, 576 N.W.2d 112, 113 (Iowa 1998).

III. Enforcement of Mechanic's Lien.

Iowa Code section 572.2 provides:

Every person who shall furnish any material or labor for, or perform any labor upon, any building or land for improvement, alteration, or repair thereof, including those engaged in the construction or repair of any work of internal or external improvement, . . . by virtue of any contract with the owner, the owner's agent, trustee, contractor, or subcontractor shall have a lien upon such building or improvement, and land belonging to the owner on which the same is situated . . . , to secure payment for material or labor furnished or labor performed.

A mechanic's lien claimant must prove either an express or implied contract with or on behalf of the lessor or vendor in order to claim a lien against the lessor's realty. *Id.* at 114. The establishment of an express or implied agreement whereby the lessee is contractually bound to improve the lessor's property is a prerequisite to plaintiff's successful assertion of its claim. *Id.*

There is no question that Meis and Cornelius entered an express oral contract committing Meis to remodel Cornelius' real estate in exchange for \$20 per hour for labor, plus the cost of materials. We find this language clear and unambiguous and therefore not subject to interpretation or construction. *Spilman v. Davis County*, 253 N.W.2d 593, 596 (Iowa 1977). The main issues to determine in the case, then, are

twofold: (1) whether there was an implied condition or term of the contract between Meis and Cornelius that Meis would furnish only “highly skilled and experienced carpenters” and (2) whether Meis overcharged Cornelius for materials.

A. *Implied Contract for Experienced Labor.* Generally, an express contract supersedes an implied contract relating to the same subject matter. *Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d 188, 194 (Iowa App. 1984). However, if the implied contract is not a point covered by the express agreement, the implied contract is not superseded. *Id.* In this case, while the amount Cornelius was to pay for labor was covered, the quality of labor was not.

To prove the existence of an implied contract term, it must be shown that the parties have manifested their agreement by conduct rather than words. *Irons v. Community State Bank*, 461 N.W.2d 849, 855 (Iowa App. 1990). An implied term may arise from the surrounding circumstances concerning the relationship of the parties. *Id.*

The conduct of the parties in this case does not imply the existence of an agreement between the parties that Meis would charge \$20 per hour only for “highly skilled and experienced carpenters.” Cornelius paid all weekly statements for a month without objection. The labor he paid for was performed by carpenters of varying degrees of experience and skill. It was not until Cornelius was experiencing financial difficulties that he asserted the two had an agreement on the skill level and experience of the carpenters Meis would employ. Cornelius has presented no

evidence the conduct of these parties constituted an implied contract term or condition on this subject. He has not proved an implied contract. For this reason, the trial court's ruling on this issue is affirmed.

B. Cost of Materials. Meis and Cornelius expressly agreed Cornelius would pay for "the cost of materials." We agree with the trial court's finding that "cost of materials" is ambiguous. Accordingly, extrinsic evidence is admissible to shed light on the situation of the parties, antecedent negotiations, the attendant circumstances, and the ultimate intention of the parties. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997).

Meis purchased materials at a contractor's discount and charged Cornelius a handling charge of ten to fifteen percent. Again, Cornelius paid several statements including the handling charge without objection and it was not until Cornelius experienced financial difficulty that he objected to the handling charge. Even with the handling charge, Cornelius was charged less than retail value for the materials. Cornelius presented no evidence "cost of materials" meant a cost other than Meis' cost plus a handling charge.

Meis testified the ten-percent handling charge was customary in the the trade. It is for the trier of fact to accept or reject a certain practice as a prevailing trade custom. *See Hunter v. Bd. of Trustees of Broadlawns Medical Center*, 481 N.W.2d 510, 516 (Iowa 1992). *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 545 (Iowa 1995). The trial court accepted the handling charge as customary.

Appellate courts consistently recognize that factual disputes which depend heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility than the appellate court. *IBP, Inc. v. City of Council Bluffs*, 511 N.W.2d 413, 415 (Iowa App. 1993). We will not redetermine the credibility of the witnesses on appeal when the trial court's findings are supported by substantial evidence on the record. For these reasons, the trial court's ruling on this issue is affirmed.

We have considered Cornelius' contentions that he was billed excessive time for labor and he should have been charged less for the materials Meis used out of his own inventory and find them to be without merit. The trial court is affirmed on these issues.

AFFIRMED.